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Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~[illegible]~~ 70-202

THE KROGER CO.,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF AUTHORITIES

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THE KROGER CO.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, The Kroger Co. ("Kroger"), prays a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming a 3-2 decision of the Federal Trade Commission (the "Commission").

INTRODUCTORY STATEMENT

The decision below is a first impression construction of the "buyer" provision—subsection 2(f)—of the Robinson-Patman Act (which amended Section 2 of the Clayton Act). That provision forbids a buyer "knowingly to induce or receive a discrimination in price . . . *prohibited* [to the seller] by this section."[1]

The case arose from a joint complaint and hearing charging Beatrice Foods Co. ("Beatrice"), as seller, with price discrimination prohibited by subsection 2(a) of the Act, and Kroger, as buyer, with violating subsection 2(f), with respect to the identical transactions (174-76; 180-81).[2]

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[1] Emphasis supplied throughout unless otherwise indicated.

[2] Record designations used in the petition are identified in the Index at pages iii and iv, *supra*.

The Hearing Examiner dismissed the charges against both Kroger and Beatrice. The Commission majority reversed as to Kroger alone, holding that it had violated 2(f), while simultaneously ruling that Beatrice had not granted Kroger any price discrimination *"prohibited"* by 2(a).

The Court of Appeals affirmed that holding—which Commissioner Elman, dissenting, had characterized as:

> "The novel and extraordinary legal theory on which the Commission now imposes 2(f) liability on Kroger" (D:98).

The decisions below conflict squarely with the text of 2(f) and with every previous decision applying it, including this Court's controlling precedents. The resulting issues are of vital importance to the consuming public and the American business community.

There is also fundamental conflict with the notice requirement of § 5 of the Administrative Procedure Act, 5 U.S.C. § 554 (Supp. V), concerning both "matters of fact and law asserted." As Commissioner Elman further noted, the "extraordinary legal theory" invoked against Kroger "was neither alleged in the complaint, issued July 30, 1965, nor urged by Commission counsel at any [timely] stage of these proceedings" (D:98).[3]

The critical issues involved cannot be masked in a "substantial evidence" guise. As will be shown, the opinions and the government's admissions below are themselves clear that the sole basis of the unauthorized and unprecedented ruling below was a second fundamental procedural error, in sanctioning government counsel's belated injection of a

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[3] At the outset of the hearings, it was expressly affirmed by Commission counsel (hereafter "government counsel"):

> "[T]his case joins Kroger and Beatrice in the same complaint, one lodged—one charged with 2(a) and the other one charged with a violation of 2(f). *And there can't be a violation of 2(f) without 2(a).*" (183).

wholly new issue on their appeal of the Initial Decision to the Commission. Its essence was the untimely impeachment, at that stage, of Mr. Francis X. Casserly, a former Kroger employee, who was a government witness and had been credited by the government throughout the prior proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 438 F.2d 1372, is appended hereto as Appendix A, pages CA:1-CA:15.[4] A "Separate Appendix" contains the opinions of the Commission, not yet officially reported, at pages FT:4-FT:89 (majority) and D:90-D:98 (concurring and dissenting), and the Initial Decision at pages ID:99-ID:169.

JURISDICTION

The judgment of the Court of Appeals, appended as Appendix B, pages CA:16-CA:17, was entered February 25, 1971. That court's jurisdiction was based on subsection 5(c) of the Federal Trade Commission Act, 15 U.S.C. § 45(c). Subsection 5(b) of that Act provided the Commission's jurisdiction. 15 U.S.C. § 45(b).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Section 2 of the amended Clayton Act authorizes a determination that the buyer violated 2(f) by accepting a price which the seller lawfully granted?

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[4] "Appended" materials are incorporated in this petition following "Reasons for Granting the Writ," namely, Appendices A, B, C and D, and Addenda I and II.

2. Whether the standards applied for determining 2(f) liability conflict with controlling decisions of this Court?

3. Whether the Administrative Procedure Act and the Commission's Rules of Practice were violated because 2(f) liability was based on matters of fact and law first asserted when government counsel changed the theory of the case in appealing the Hearing Examiner's adverse decision to the Commission?

STATUTES INVOLVED

The statutes involved are §§ 2(a), (b) and (f) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. §§ 13(a), (b) and (f)), and §§ 5(a) and 5(b)(2), (3) of the Administrative Procedure Act (5 U.S.C. §§ 554(a), 554(b)(2), (3) (Supp. V)). These statutes are appended as Appendix C, pages A:18-A:20.

In brief, 2(a) of the Clayton Act forbids discriminatory prices which threaten competitive injury, unless the "differentials" reflect cost differences "resulting from the differing methods or quantities" in which the goods are "sold or delivered"; 2(b) authorizes a seller "in good faith to meet an equally low price of a competitor"; 2(f) forbids a buyer "knowingly" to accept "a discrimination in price which is prohibited by this section."

Section 5 of the Administrative Procedure Act requires that respondents in an "agency hearing" receive timely notice of "the legal authority and jurisdiction under which the hearing is to be held" and of "the matters of fact and law asserted."

REGULATIONS INVOLVED

The regulations involved are the Federal Trade Commission's Rules of Practice (§§ 3.41(d), and 3.54(a), 16 C.F.R. §§ 3.41(d); 3.54(a)), appended as Appendix D, page A:21. They prescribe the Commission's procedure for impeaching a witness and its jurisdiction in reviewing an Initial Decision.

STATEMENT OF THE CASE

A. *Beatrice's Different Methods and Quantities in Selling Kroger, Compared With Other Customers*

1. The alleged discrimination involved Beatrice's sales, from June 1962 until October 1963, to 44 stores in Kroger's Charleston Division, consisting of West Virginia and small sections of Ohio and Kentucky (FT:5, 9). Beatrice used wholly different methods of sale and delivery to Kroger (FT:6; ID:114). The product was private-branded as "Kroger label milk" (FT:14; CA:5), with "responsibility for advertising . . . upon Kroger" (ID:112). Delivery was made by a "form of reduced service which would cut distribution costs" (CA:6)—namely, "a 'stripped service' basis whereby Kroger personnel performed all of the functions in the nature of in-store services that Beatrice' route salesmen otherwise performed" (FT:6).[5] For purposes of this arrangement, Beatrice further reduced its costs by amendment of its union contract to reduce routemen's commissions by 25%—*i.e.*, from 8% to 6% (506-07; X 29).[6]

[5] Additionally, under this "stripped" method, "simplified ordering and billing procedures can be used and the usual liberal return privilege modified" (FT:19). See ID:111-12.

[6] "X" designations are to the pages of the lower court Appendix, Volume III, containing the exhibits below. All such designations are to government exhibits unless coupled with the designation "RBX", which signifies a Beatrice exhibit.

2. Beatrice's other customers bought its "vendor branded" product (CA:4)—either "Meadow Gold" or "Greenbrier" (FT:8). They received the "'full service' method of milk distribution, requiring the routeman to deliver and also stock the dairy case" (CA:4) and "to devote time to matters of ordering, invoicing and billing" (FT:11).

3. Kroger purchased much greater product quantities per store than any other Beatrice customer. Before considering the arrangement, Beatrice's main interest was in "finding out . . . the volume of business of each Kroger store" (FT:17; CA:5). Its plant manager (G. C. Stollings), a government witness, testified that he received the figures at his first meeting with Casserly and that Kroger's per store volumes averaged 50% of Beatrice's "wholesale milk routes" (232).[7]

B. *Background of the Kroger-Beatrice Arrangement*

4. The background of the arrangement was Kroger's decision to buy such goods from one supplier (FT:70). Kroger had two principal reasons. First, because many of its stores had to carry numerous name brands, they were subjected to the "nuisance" of repeated daily calls by routemen (FT:11, 13). Second, the "absence of a division-wide brand" precluded "effective advertising" (FT:13).

5. The arrangement followed negotiations with several dairies, in which Kroger was represented by Mr. Francis

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[7] The court below incorrectly implied that Kroger's volume was the "result" of the arrangement and that Kroger's "Addendum I" disclosed "higher profits" (CA:14). Only store volumes, not profits, appeared in that Addendum (appended as Addendum I, page A:23).

X. Casserly, Manager of its Dayton, Ohio dairy plant (FT: 13). At that time, the dairies' "published price lists . . . applied only to those brand products that were delivered under the regular- or full-service agreements" (ID:114). Actual selling prices "were based on a list price *less a percent discount*" (FT:6; CA:4). Beatrice was aware of "'trade discounts in the area that were generally *ten* percent, some of them as high as *fifteen* percent.'" (FT:23).

C. *The Original Broughton Offer*

6. Casserly initially contacted four dairies already serving Kroger,[8] but not Beatrice, which was not believed to use the desired container (ID:115-16). Broughton Farm Dairy made the first proposal, as of January 6, 1962 (CA:5; FT:15), based on the December 1961 market (X 129-63). This proposal *did not mention list prices.* It was "in the form of tabulations covering each Kroger store location and showing the existing retail price out of each store, the *'prevailing wholesale price in the market',* the proposed price for Kroger label products and *a percentage figure for Kroger's gross profit.*" (FT:15-16; CA:5).[9]

7. As a government witness,[10] Casserly "testified that Broughton 'indicated discount off list price on this bid of up to 20 per cent'" (FT:16 n. 1). Government counsel neither challenged Casserly nor offered any testimony con-

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[8] Namely, Broughton Farm Dairy, Fairmont Foods Company, The Borden Company, and Valley Bell Dairy (CA:5; ID:113).

[9] The tabulations incorporated 572 prices for 16 items in 33 different communities (X 130-63).

[10] Casserly had previously severed his association with Kroger (248). The Commission Chairman expressly ruled that he was a government witness (577).

tradicting him.[11] Instead, government counsel credited Casserly, proposing that the Examiner find as follows (547):

> "121. *The First Offer Received Quoted a Price of List Price Less 20%.*
>
> "Early in January 1962, Broughton submitted its initial proposal to Kroger for pricing on private label milk and dairy products. (Casserly, Tr. 594). Broughton was already serving seven stores in Kroger's Columbus, Ohio Division with private label. (Casserly, Tr. 596). The bid which Broughton submitted in January was essentially the same offer that it was using in the Columbus Division, that was, a 20 percent discount off of list price. (Casserly, Tr. 596, 603)."

The Examiner found that Broughton "offered discounts approximating 20 percent from its list prices" (ID:118).[12]

8. On appeal to the Commission, government counsel changed position, claiming "*'Kroger Misled the Dairies Concerning Receipt of a 20% Discount Offer'*" (CA:11). This claim was a revised interpretation of the same Broughton offer underlying counsel's proposed finding to the Examiner. It was expressed by an improvised table

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[11] Government counsel did not call Mr. Robert N. Hurst, the Broughton official who submitted its proposal to Casserly (273, 370-71); although he had been scheduled as a government witness following Casserly's appearance (541, 542, 544, 338).

[12] Government counsel never disputed Casserly before the Examiner. In their reply to respondents' proposed findings, counsel described Casserly's testimony as follows (558):

> "This bid was characterized by Mr. Casserly as representing *an average discount of approximately 20%* . . . . In actuality, an examination of this Broughton proposal shows that it did not offer a *uniform* 20% discount".

Casserly had never testified that Broughton offered "a uniform 20% discount." According to the Commission, he had described it as "'an average 20 percent'" (FT:15); "'up to 20 percent'" (FT:16 n. 1); "'in the neighborhood of 20 per cent'" (FT:44).

of percentage discount figures, newly injected by counsel's Reply Brief to the Commission (FT:16), and never tested by submission as evidence. Citing only that brief, the Commission accepted those figures as fact, while acknowledging first, that they represented "*Complaint counsel's calculations* show[ing] an average discount on gallons for all Kroger locations *as stated by Broughton* of a little less than 11%" (*ibid.*; CA:5); and, second, that the "*figures shown by Broughton . . . are somewhat different*" (FT:16 n. 1).[13] On that basis, the Commission impeached Casserly, holding that his "testimony characteriz[ing] these prices as amounting to a discount of 'an average of 20 percent' * * * was not true" (FT:15).

9. The court below imposed 2(f) liability by adopting the Commission's finding that Kroger had given "'false price information' to Beatrice as to Broughton's competing bid" (CA:2; FT:47).

The opinion mistakenly asserted:

> "It is uncontested that prices in the bid averaged a discount of 10.9 per cent. (Appendix 646.)" (CA:5).[14]
>
> * * *
>
> "We find no denial of this fact in the appellant's briefs" (CA:10).

Kroger did contest and deny that purported fact.[15]

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[13] In adopting the reply brief "calculations," the Commission made no mention either of counsel's shift in position or of its own subsequent recognition that discounts of 10-15% were common on vendor brands (FT:23).

[14] "Appendix 646" refers to government counsel's reply brief on appeal to the Commission (646). The opinion below was inconsistent regarding this offer, first stating that Broughton's gallon quotations "rang[ed] from slightly over 73 cents to more than 81 cents" (CA:6), but later acknowledging quotations in the 65 to 68 cent range (CA:10).

[15] Kroger's briefs noted, *inter alia*, that government counsel's improvised table, underlying the "less than 11%" finding,

[*Footnote continued on next page*]

D. *Beatrice's Introduction of Formula Pricing*

10. Off-list proposals lost significance within a week of Broughton's original offer, when Beatrice, having "heard rumors that Kroger was seeking private label milk, contacted Casserly and arranged a meeting on January 12." (CA:5). As a result of that meeting, Beatrice's representatives "considered the possibility of exploring a formula method of pricing—one which would be geared to their cost of milk rather than a discount from list price" (FT:18), and would cover "manufacturing and distributing costs, plus profit" (ID:119).

11. On January 25, 1962, the Beatrice representatives learned to their "surprise" that formula pricing "was attractive to Mr. Casserly" (ID:120).[16] When advised that Kroger was receptive, all interested dairies quickly offered formula prices. By mid-March 1962, Kroger had received such offers from four dairies (FT:26-27 [Broughton], FT:28 [Fairmont], FT:29-30 [Borden], FT:30-32 [Beatrice]).

". . . was a bobtailed and misleading representation of the Broughton proposal, never put in evidence and never tested by interrogation through Mr. Casserly or anyone else." (*Reply Brief of The Kroger Co.*, No. 20,233, United States Court of Appeals for the Sixth Circuit, at 6.)

* * *

". . . the Broughton proposal did not speak of list prices and contained no reference to the percentage discounts shown in the abridged table introduced in Commission counsel's reply brief." *Id.* at 8.

[16] The opinion below mistakenly states that "larger buyers, led by Kroger, began to demand and get formula prices based on the fluctuating cost of raw milk" (CA:5).

E. *The Dairies' Assurances That Their Proposals Were Lawful*

12. Kroger received clear assurances from three of the dairies, including Beatrice, that their proposals were lawful under the Robinson-Patman Act (FT:34-35; ID:125-26, 147). Beatrice's proposal was first made to Casserly "subject to review and approval by Beatrice's legal department" (ID:128). It was officially given to him, three weeks later, as a "revision . . . approved by Chicago counsel" (FT:35). Fairmont gave Casserly "memoranda of law . . . prepared by its attorneys discussing the question of cost justification" (FT:29). These analyzed in detail "various types of savings" in Fairmont's "expenses for advertising, billing, servicing, and delivering." (ID:121). "Because of these savings, Fairmont stated that its prices could be cost justified" (*ibid.*). Casserly was "advised that the prices in Borden's Plan No. 2 [stripped service] reflected savings attributable to the limited service involved" (ID:125).

F. *Beatrice Met Fairmont's Prices, Not Broughton's*

13. Contrary to the opinion below, Beatrice's objective was to meet Fairmont's prices, not Broughton's.[17] This was recognized by all concerned, including the government, the Examiner and the Commission. In appealing to the Commission, government counsel declared:[18]

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[17] The court simply misread the record in twice asserting that Beatrice's endeavor was to meet "Broughton's equally low price." (CA:2, 9). This misconception was the ground of its decision that Beatrice's "successful defense under § 2(b) cannot exculpate the buyer" (CA:9).

[18] Volume I, *Appeal Brief of Counsel Supporting the Complaint* at 66.

> "[Beatrice] knew that its only serious contender was Fairmont as early as January 25, 1965. (Tr. 384-85, 492). If then determinedly proceeded to offer lower and lower prices until it got below Fairmont's proposal. (Tr. 412-13, 495-97)."

The Examiner found that Beatrice's purpose was "to meet a competitive bid of Fairmont Foods Company" (ID:154). The Commission found that Beatrice had quickly ascertained that its "primary competition was not Broughton but Fairmont" (FT:21)[19] and thereafter its object was "to try and meet [Fairmont's] offer." (FT:29 n. 1).

14. Beatrice initiated its formula proposal to Casserly on March 14, 1962. "[K]nowing it probably wasn't quite as good as Fairmont" (220), Beatrice—through Stollings—first quoted 68¢ on gallon jugs (CA:7). Casserly replied "'that he had received a bid *from Fairmont* that was better than this'" (*ibid.*). Stollings "talked with Casserly about the 66 cent price, and Casserly replied that 'now you are getting—you are in a position of being competitive with some of the other people.'" (CA:7-8). At this point, Casserly and Stollings "'worked out a formula'" (CA:7).[20]

15. Beatrice's March 14 proposal "was not considered to be final by either party" (FT:34). Casserly stated only

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[19] Casserly had so informed Beatrice. Speaking of a meeting with Casserly on January 25, 1962, Beatrice's District Manager, Hugh Hutchinson, so testified as a government witness (204):

> "Q. Did you get that impression from talking to Casserly that Fairmont was now your main contender?
> "A. He told us."

[20] The record refutes the court's later recital that "Casserly himself built up the cost formula" (CA:12). Stollings described the joint process and testified: "The price was a result of my saying we will sell you milk for 66 cents." (240).

that it was " 'competitive' ", while Beatrice advised that it "would have to be submitted to the company's Chicago office for review by counsel". (*Ibid.*)

16. Believing that the Fairmont and Beatrice offers "were the most desirable," but finding them "difficult to compare," Casserly "turned [them] over to his accountant for a comparative evaluation" (ID:129). The accountant reported that "it was impossible on the basis of price of fluid milk to distinguish between them",[21] noting a "difference" only on cottage cheese, an item of "comparative insignificance" (FT:42). Casserly felt Beatrice's "constant price" on that item was "more favorable than Fairmont's fluctuating price" (FT:42; ID:129). In fact, "Kroger's cost for cottage cheese . . . would have been lower under the Fairmont price" (FT:42 n. 2).

17. On April 9, 1962, Stollings handed Casserly a "revision of the Beatrice proposal dated April 5, 1962, which had been approved by [Beatrice's] Chicago counsel" (FT:35). Deliveries began in June 1962, following Casserly's rejection of Fairmont's offer "to reduce its quotations upon satisfactory proof that such reduction was necessary to meet a pricing schedule proposed by a competing supplier" (FT:36).

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[21] For the five relevant West Virginia areas (FT:9, 16), the Fairmont and Beatrice formula proposals quoted the following milk prices per gallon jug (FT:28, 35):

Area	*Fairmont*	*Beatrice*
Beckley	$.6526	$.66
Charleston	$.6526	$.66
Clarksburg	$.7255	$.66
Lewisburg	$.6526	$.66
Logan	$.6533	$.66

G. *The General Offer of Equivalent Prices on Formula, Limited Service Terms*

18. The much lower price structure feasible for the dairies, under formula and limited service terms, was demonstrated in February 1963 (FT:64)—midway in the alleged discrimination period (FT:5). At that time, "[r]esponding to competitive moves by other dairies" (FT:53),

> "Beatrice instituted a new program of 'tailgate' service throughout the area covered by its Beckley plant *which resulted in sharply reduced prices for all purchasers under the normal discount system.*" (FT:87).[22]

Like Kroger's private label prices, Beatrice's "tailgate" prices were tied to raw milk costs[23] and were offered "in exchange for the performance of certain in-store services by its customers" (FT:54).

19. As a result, "the differentials between Kroger's private brand products and Beatrice brand products were significantly reduced." (FT:64).[24] In February 1963, Kroger's gallon price was 65.6¢ (FT:48), compared with a tailgate price of "68 cents per gallon" (FT:54).

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[22] The Beckley plant covered the "Charleston and Beckley areas" (FT:64), and served all but 5 of Kroger's 44 stores (ID:135).

[23] As was true of Kroger's formula prices (FT:35-36), the "tailgate" prices were "based on the Class I price, Federal Market Order No. 5, Huntington, West Virginia" and were to "fluctuate with Federal Market Order price changes each month" (RBX 123C at X 280).

[24] "Within a matter of days", moreover, tailgate customers were favored with "full in-store services, but at the reduced price level" (FT:54), upon demand of "independent grocers" (504).

H. *Beatrice's Cost Study*

20. In defending the 2(a) charges, Beatrice introduced a cost-justification study (FT:74-76), which was rejected as "not of sufficient reliability" (ID:166; FT:79). The Examiner excluded it from the case against Kroger since it "came entirely from the records of Beatrice, none of which were shown to . . . [Kroger] at the time of the negotiations" (ID:155).[25] Having dismissed Beatrice under 2(b), the Commission considered "cost justification" only as to Kroger, holding that "to some extent the validity" of Beatrice's study was relevant to the 2(f) charges (FT:71-72).

I. *The Decisions Below*

21. The Examiner and the Commission both dismissed the 2(a) charges against Beatrice under the 2(b) "meeting competition" defense (ID:168; FT:88). In dismissing Kroger, the Examiner followed *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61 (1953), quoting, *inter alia* (ID:147-48), its holding that ". . . § 2(f), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within one or more of the 'defenses' available to sellers . . . set out in the provisos of §§ 2(a) *and 2(b).*" 346 U.S. at 71.

He further held that because there was no "probative evidence that Kroger had any reasonable basis to believe

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[25] This ruling is the apparent basis of the court's reference to "Kroger's strategy" in emphasizing that "its responsibility could not be judged by the acts of Beatrice." (CA:11). However, this "strategy" and the Examiner's ruling reflected the following 2(f) principle enunciated by the Commission in *Fred Meyer, Inc.*, 63 F.T.C. 1, 67 (1963):

> "A valid cost study showing that the concessions *were* cost justified would defeat complaint counsel's case, but the converse is not true: such a study, if it showed that the concessions were *not* cost justified, would not prove that respondents 'knew' that fact." (Emphasis in original.)

that the prices offered it by Beatrice were not, in fact, cost-justified", the 2(f) charges were unsupportable "regardless of the decision" as to Beatrice (ID:149).

22. While affirming as to Beatrice, the Commission reversed as to Kroger, ruling that it "bargained too hard" when Casserly "falsely" represented "the original Broughton offer" and "*failed* to convey any *correct* information about the price levels being quoted by others." (FT:80-81; emphasis in original). The Commission held *Automatic Canteen* did not mean that a seller's 2(b) defense protected a buyer receiving "a second discriminatory offer which meets an offer *previously induced by the buyer*" (FT:82; emphasis in original).[26] It so held despite its disavowal of any ruling that Fairmont's proposal was unlawful (FT:29 n. 1).[27]

The Commission imputed "2(f)" knowledge to Kroger because it was not advised "that specific differentials . . . were cost justified." (FT:84-85).

Commissioner Jones alone favored the decision against Kroger and the dismissal of Beatrice. (CA:3-4).

23. Commissioner Elman's dissent pointed out (D:96-97):

> ". . . the Commission does not find, because the record would not justify such a finding, that (1) the price offers made to Kroger by Beatrice's competitors were unlawful under Section 2(a), and (2) either Beatrice

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[26] The only authority cited by the Commission was a case brought under § 5 of the Federal Trade Commission Act, in which Commissioner Elman—who dissented here—wrote the opinion. *Max Factor & Co.*, 66 F.T.C. 184, 249, 251 n. 4 (1964).

[27] The Commission never discussed the legality of any other proposal to Kroger. In any event, it is questionable whether the legality of the price being met is material. *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356, 366 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956); *Standard Oil Co. v. Brown*, 238 F.2d 54, 58 (5th Cir. 1956); Chairman Dixon's separate opinion at D:92.

> or Kroger had any reason to believe that the price offers made by the other sellers were unlawful. We are confronted, then, with a Commission decision holding Kroger guilty under Section 2(f) of 'knowingly' inducing or receiving 'a discrimination in price which is prohibited by this section', on a record which fails to show any price discrimination illegal under Section 2."

24. The Court of Appeals nevertheless affirmed the Commission. Rejecting the contention that "there cannot be a violation of section 2(f) without there being one under section 2(a)", it held (CA:2):

> "While ordinarily this may be true . . . it is not true under the peculiar circumstances here, where Kroger was found by the Commission to have given 'false price information' to Beatrice as to Broughton's competing bid which induced Beatrice in perfect good faith to meet Broughton's equally low price."

REASONS FOR GRANTING THE WRIT

1. The Decision Below Departs From the Uniform Rule That There Can Be No 2(f) Violation Absent a 2(a) Violation.

Subsection 2(f) of Section 2 of the amended Clayton Act applies only to a buyer "knowingly" favored by a price discrimination "prohibited by this *section*." The "section" includes subsection 2(b), under which the Commission dismissed the 2(a) charges against Beatrice.[28] Dismissal of

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[28] This Court has conclusively held that 2(b) "afforded a seller a complete defense to a charge of price discrimination." ***FTC*** v. *Standard Oil Co.*, 355 U.S. 396, 397 (1958).

the 2(f) complaint against Kroger was accordingly required because there was no "prohibited" discrimination. As Commissioner Elman perceived, the result below produces the paradox of

> ". . . a Commission decision holding Kroger guilty under Section 2(f) . . . on a record which fails to show any price discrimination illegal under Section 2." (D:96-97).[29]

This result conflicts with all prior authorities, including *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 71, 74 (1953) and *FTC* v. *Simplicity Pattern Co.*, 360 U.S. 55, 65 n. 6 (1959).[30]

In *Automatic Canteen, supra*—involving prices the buyer "knew were as much as 33% lower" (346 U.S. at 62)[31]—the Court held (*id.* at 71, 74):

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[29] Four of the Commissioners favored a result harmonizing 2(a) and 2(f)—two of the majority who would have held Beatrice liable and the two who dissented from the ruling against Kroger. See the opinion below at CA:3-4.

[30] *Texas Gulf Sulphur Co.* v. *J. R. Simplot Co.*, 418 F.2d 793, 803-05 (9th Cir. 1969); *Mid-South Distributors* v. *FTC*, 287 F.2d 512, 517 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961); *American Motor Specialties Co.* v. *FTC*, 278 F.2d 225, 229 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960); *Fred Meyer, Inc.*, 63 F.T.C. 1, 51 (1963); *Bird & Son, Inc.*, 25 F.T.C. 548, 553 (1937); *Sears, Roebuck & Co.*, 66 F.T.C. 371, 376, 378 (1964).

[31] These differentials were ignored in the citation below of differentials in other cases (CA:14 n. 4), only one of which involved 2(f). *Fred Meyer, Inc.* v. *FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd in part on other grounds*, 390 U.S. 341 (1968). That case concerned an "annual promotion", during which lower prices were granted a buyer who "pays the going price during the other eleven months of the year." *Id.* at 355, 364.

According to a "chart, page 34, Commission's brief" (CA:14)—appended at p. A:24—the differentials urged here as proof of illegal discrimination against full service-brand customers, ranged from 10.22% to 17.51%—except for 28.01% in the case of "City Market, a very small customer in Rainelle, West Virginia" (FT:49). Unlawful discrimination is not established by "any discrepancy in price between any two purchasers," even if not cost justified. *United States* v. *Borden Co.*, 370 U.S. 460, 468 (1962).

". . . § 2(f), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within *one* or more of the 'defenses' available to sellers, such as . . . cost differences . . . *or bona fide attempts to meet competition,* as those defenses are set out in the provisos of §§ 2(a) and 2(b)."

• • •

"We therefore conclude that a buyer is not liable under § 2(f) if the lower prices he induces are either within *one* of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." [32]

In *Simplicity Pattern, supra,* the Court similarly declared that 2(f) liability is derivative (380 U.S. at 65 n. 6):

"Subsection (f) is a corollary to § 2(a), making it unlawful 'knowingly to induce or receive' a price discrimination *barred* by the latter."

Until this case, the Commission's position was identical. It had held in *Fred Meyer, supra,* 63 F.T.C. at 51:

"Under Section 2(f) the buyer is exonerated unless it is shown that he either knew or should have known not only that he has received a discriminatory price, but also that the discrimination cannot be justified under *any* of the available defenses." [33]

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[32] In a tortured effort to escape this holding, the court below italicized the last clause (beginning "or not known"), despite the preceding clause absolving a buyer "if the lower prices he induces are . . . within *one* of the seller's defenses" (CA 8).

[33] The Act's co-author and its leading commentator agree that under 2(f), the Commission "must also show that the discrimination was not justified under *any* of the defensive provisos in Subsections 2(a) and 2(b)." Patman, *Complete Guide to the Robinson-Patman Act* 157 (1963); Rowe, *Price Discrimination Under the Robinson-Patman Act* 447 (1962).

The fatal defect of the decision below is that it judicially amends subsection 2(f) to comprehend price differentials which are not *"prohibited"* by Section 2. Because such amendment is intolerable, *Simplicity Pattern, supra,* reinstated a Commission decision that 2(b) does not allow cost justification or lack of competitive injury as defenses to a seller charged with granting non-proportional services and facilities in violation of subsection 2(e). Noting that those defenses "by their terms apply to price discriminations" (360 U.S. at 66-67), the Court held (*id.* at 67):

> "On the other hand, the only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the § 2(b) proviso. *We cannot supply what Congress has studiously omitted.*"[34]

What is sauce for the Commission must be sauce for the private litigant, especially where the Commission *sub silentio* reverses its own prior doctrine. See *Fred Meyer,* p. 19, *supra.*[35]

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[34] See also *FTC* v. *Ruberoid Co.,* 343 U.S. 470, 478-79 (1952).

[35] The Commission also flouted *Automatic Canteen* in charging Kroger with knowledge that Beatrice's prices were unlawful because it "did not receive any information . . . that specific differentials . . . were cost justified." (FT 84-85). But *Automatic Canteen* teaches that Kroger's "[i]nsistence on [such] proof of costs" was precluded by "other antitrust policies." 346 U.S. at 69. Having been assured that Beatrice's counsel had approved the legality of its offer (pp. 11, 13, *supra*), Kroger could require no more.

The differences in "methods or quantities" in this case foreclose the conclusion that "the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference." *Automatic Canteen, supra,* 346 U.S. at 80. The method and quantity differences here far surpassed those which dictated dismissal of *Automatic Canteen* on remand from this Court. *Automatic Canteen Co.,* 51 F.T.C. 574, 576-77 (1955).

2. The Statutory Specification of Derivative Buyer Liability Does Not Allow the Exception Which the Lower Court Devised on the Hypothesis That the Buyer "Was Found by the Commission to Have Given 'False Price Information'" (CA:2).

(a) *The Robinson-Patman Authorities Foreclose Such an Exception.*

Assuming *arguendo* that Casserly misstated Broughton's offer, the authorities repel the notion that 2(f) requires a buyer to provide "*correct* information about the price levels being quoted by others." (FT:81; emphasis in original). For good reason all prior decisions sustain Commissioner Elman's analysis (D:97):

> "No one has heretofore conceived of the Robinson-Patman Act as imposing a duty of affirmative disclosure on buyers engaged in price negotiations with sellers, requiring them to convey 'correct information' on the prices quoted by other competing sellers."

This accurately reflects *Automatic Canteen's* mandate against reading 2(f) to "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (346 U.S. at 63). It heeds *Automatic Canteen's* warning against "putting the buyer at his peril whenever he engages in price bargaining" because of the resultant threat to "sturdy bargaining between buyer and seller" (346 U.S. at 73-74).[36]

"Sturdy bargaining" cannot proceed under the "correct information" requirement. The first offer a buyer received would then set the floor for all sellers, since 2(b) in terms applies only to a price offered "to meet an *equally* low price of a competitor."[37] That would resurrect the "'meet but not beat' criterion" which the Commission held would improperly "outlaw such bidding situations" by injecting an

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[36] See also *FTC v. Standard Oil Co.*, 355 U.S. 396, 403 (1958).

[37] Kintner, *A Robinson-Patman Primer* 185 (1970).

"artificial and rigid test" (FT:70-71).[38] Nor would a buyer's silence, if permissible, comport with *Automatic Canteen's* endorsement of "sturdy bargaining." That would mean the buyer's renunciation of any bargaining.

As the First Circuit perceived, the "correct information" concept, however appealing in theory, is commercially "naive." *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47, 55-56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965). It there held:

> "[The Commission] ruled that to establish the § 2(b) defense the seller must have proof positive before its cut in price of the amount of competitive offers and the names of the bidders who made them. . . .
>
> "We may not be in as intimate touch with the ways of commerce as the Commission, but we would be naive indeed if we believed that buyers would have any great solicitude for the welfare of their commercial antagonists, sellers. The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place. The Commission's requirement is unrealistic."

This is simply common sense. Suppliers are not so gullible as to accept without question whatever a buyer may represent as to competing offers.

There is no *ad hoc* need to ignore the legislative limits of 2(f) in order to deal with buyers who allegedly misstate the quotations they receive—assuming, *arguendo*, that it is unlawful to do so. Commissioner Elman's opinion for the Commission in *Max Factor & Co.*, 66 F.T.C. 184, 251 n. 4

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[38] It thereby applied the established rule—recognized since *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 758-60 (1945)—that 2(b) protects a seller who beats a competitor's price believing that it is a " 'competitive necessity'." (FT:71 n. 1).

(1964), points to the availability, for that purpose, of Section 5 of the Federal Trade Commission Act.[39]

(b) *No Such Exception Was Permissible Here Because the Determination That Casserly Misrepresented Broughton's Offer Was Foreclosed by the Administrative Procedure Act and the Commission's Rules of Practice.*

The holding that Casserly misstated Broughton's offer was not only unwarranted (see pp. 7-9, *supra*), but was impermissible under the Administrative Procedure Act. That Act guaranteed Kroger "timely" notice of "matters of fact and law asserted." (5 U.S.C. § 554(b)(3) (Supp. V)). The controlling principle in applying the Act is that "agency action must be set aside . . . if the action failed to meet statutory, procedural, or constitutional requirements." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, —— U.S. ——, 91 S. Ct. 814, 822 (1971).

The authorities applying that principle repel a "change in theory at the Commission level". *Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252, 1256 (D.C. Cir. 1968). They teach that "the time for giving notice of the matters of fact and law asserted is prior to the hearing, not in [a] 'post-complaint theory of the case' unveiled in a post-hearing brief." *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 861 (2d Cir. 1966).[40]

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[39] The decision below cannot now be sustained by invoking Section 5, since the complaint referred neither to that statute nor to any alleged misrepresentation. The Administrative Procedure Act requires "timely" notice of "the legal authority and jurisdiction under which the hearing is to be held" and "of the matters of fact and law asserted." 5 U.S.C. §§ 554(b)(2), (3) (Supp. V). As Commissioner Elman noted, "this was a conventional 2(f) case, proceeding on the familiar *Automatic Canteen* theory" (D:98).

[40] *Accord: NLRB* v. *H. E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962); *Engineers & Fabricators, Inc.* v. *NLRB*, 376 F.2d 482, 485 (5th Cir. 1967); *Boyle's Famous Corned Beef Co.* v. *NLRB*, 400 F.2d 154, 164-65 (8th Cir. 1968).

Under the foregoing authorities, the following dispositive circumstances dictate reversal:

(i) the 2(f) complaint was addressed only to discriminations "*prohibited* by subsection (a) of Section 2" (175, 176);

(ii) the government's trial theory was that "*there can't be a violation of 2(f) without 2(a).*" (p. 2 n. 3, *supra*); independent 2(f) liability was never suggested to the Examiner;

(iii) the government throughout credited Casserly before the Examiner (pp. 7-8, *supra*);

(iv) the government's impeachment of Casserly in appealing the Initial Decision was the sole basis of the critical finding of misrepresentation, underlying the unprecedented imposition of independent 2(f) liability (FT: 15-16, 81-82; CA:2, 11).

In sum, this case was a classic violation of the rule commanded not only by the Administrative Procedure Act, but by due process requirements, that "an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Rodale Press, Inc., supra,* 407 F.2d at 1256. "That is more than an irregularity in practice; it is a vital defect." Chief Justice Hughes in *Morgan* v. *United States,* 304 U.S. 1, 22 (1938).[41]

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[41] It was unnecessary to "change theories in midstream" (*Rodale Press, Inc., supra,* 407 F.2d at 1256), in order to allow resolution in this proceeding of the belatedly raised factual and legal issues. There was a practical alternative. "When the new issue was raised after the hearing," government counsel should have assumed "the burden of seeking a reopening." *Majestic Weaving Co., supra,* 355 F.2d at 862. Government counsel did so in *IBEW, Local 648* v. *NLRB,* —— F.2d ——, ——, 76 LRRM 3051, 3052 (Nos. 20,623-24, 6th Cir., decided April 15, 1971). Or the Commission could have remanded the case to the Examiner *sua sponte,* as it has often done where the record before it is inadequate for decision. *E.g., FTC* v. *J. Weingarten, Inc.,* 336 F.2d 687, 692 and n. 14 (5th Cir. 1964), *cert. denied,* 380 U.S. 908 (1965); *The Procter & Gamble Co.,* 58 F.T.C. 1203, 1206-07 (1961).

The Court of Appeals' efforts to validate the unlawful agency action are misconceived. Concerning the complaint's failure to allege independent 2(f) liability, the court's answer was that it "clearly charges Kroger in the exact terms of the Act which, of course, is sufficient." (CA:11). This makes a virtue of the complaint's vice—the lack of notice to Kroger of potential 2(f) liability absent "prohibited" discrimination. Concerning the "objection that the case was tried on a different theory before the Commission" (CA:11), the court answered that the

> ". . . release of Kroger . . . because of the acquittal of Beatrice was, of course, attacked before the Commission and caused more attention to be focused on Casserly's testimony. But counsel for the Commission maintained to the Examiner that Casserly had misrepresented the Broughton bid." (CA:11).

This absolution misconceives counsel's conduct (p. 8 n. 12, *supra*) and misapprehends the law.[42] It is also rebutted by the agency opinions. The meticulous Initial Decision is silent concerning any legal issue of Kroger's possible liability if Beatrice were exonerated, and also regarding any factual issue of Casserly's credibility, "as to which the weight to be given . . . a finding by a hearing officer attains its maximum." *Majestic Weaving Co., supra,* 355

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[42] The assertion that the Examiner knew of the misrepresentation claim is based on a prior statement that in its post-hearing "reply findings," the government so "told" him (CA:10). Assuming that was the fact, it was too late when "the point was first raised." *Majestic Weaving Co., supra,* 355 F.2d at 861. Actually, it was never raised before the Examiner. The "reply findings" were the passage stating that Broughton "did not offer a uniform 20% discount." (*Brief for Respondent*, No. 20,233, 6th Cir., 48.) This accorded with Casserly's testimony. See p. 8 n. 12, *supra*. The government first claimed that "Kroger Misled the Dairies" in its appeal brief to the Commission (CA:11).

F.2d at 859.[43] The Commission's opinion points in the same direction. Although the dissent challenged the untimely injection of "the novel and extraordinary legal theory" invoked against Kroger, citing *Rodale Press*, p. 23, *supra* (D: 98), the majority nowhere intimates the presentation of that theory to the Examiner.[44]

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[43] Following *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496-97 (1951); see also, *e.g.*, *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, 409 (1962); *Dolan* v. *Celebrezze*, 381 F.2d 231, 233 (2d Cir. 1967). On every finding with which it disagreed, the Commission was as heedless of the Initial Decision as it was in *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583, 587-89 (D.C. Cir. 1970).

[44] In finding that Casserly's "testimony * * * was not true" (FT:15), the Commission violated its impeachment rule (3.41(d), p. A:21, *infra*), which follows the common law (*Columbus Coated Fabrics Corp.*, 55 F.T.C. 1500, 1527 (1959)), and thus contemplates a timely showing that the witness is adverse or hostile. *Rossano* v. *Blue Plate Foods, Inc.*, 314 F.2d 174, 178-79 (5th Cir.), *cert. denied*, 375 U.S. 866 (1963). There was no such showing and Casserly, a government witness no longer in Kroger's employ, was not "adverse" by definition (see p. 7 n. 10, *supra*). The Commission is, of course, bound by its own rules. *E.g.*, *Vitarelli* v. *Seaton*, 359 U.S. 535, 539-40 (1959); *Cinderella Career and Finishing Schools, supra*, 425 F.2d at 588-89.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1971

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 20233

THE KROGER CO.,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

Decided and Filed February 25, 1971.

Before TOM C. CLARK, Associate Justice,* and WADE H. McCREE, JR., and WILLIAM E. MILLER, Circuit Judges.

CLARK, Associate Justice:

The Kroger Company brings this petition for review in which it complains of a cease and desist order of the Federal Trade Commission holding Kroger in violation of section 2(f) of the Clayton Act, 15 U.S.C. Sec. 13(f)[1] for

* Associate Justice, Supreme Court of the United States, retired, sitting by designation.

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

having knowingly induced and received from Beatrice Food Company discriminatory prices on fluid milk and cottage cheese as prohibited by section 2(a) of the Act, 15 U.S.C. Sec. 13(a).[2] In the same order the Commission absolved Beatrice from responsibility under section 2(a) of the Act on the ground that its lower price was offered in good faith to meet an equally low price of a competitor, a defense authorized under section 2(b) of the Act, 15 U.S.C. Sec. 13(b).[3] Kroger seizes upon this circumstance contending that as a matter of law the discharge of Beatrice requires the acquittal of Kroger because there cannot be a violation of section 2(f) without there being one under section 2(a). While ordinarily this may be true—a matter we need not and do not pass upon—it is not true under the peculiar circumstances here, where Kroger was found by the Commission to have given "false price information" to Beatrice as to Broughton's competing bid which induced Beatrice in perfect good faith to meet Broughton's equally low price. Nor do we find substance to the other points raised—all of which we will discuss in more detail—and,

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[2] "It shall be unlawful . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ."

[3] "Upon proof being made . . . that there has been discrimination in price . . . the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section . . . *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . *was made in good faith to meet an equally low price of a competitor* . . . ."

therefore, affirm the order of the Commission and direct its enforcement. The portions of the order having to do with Beatrice and other parties who were before the Commission and included in its order are not before us and therefore we express no opinion concerning them.

1. The course of the proceeding.

The administrative proceeding began on July 30, 1965, with the filing of a complaint charging Beatrice with discriminating in prices in the sale of fluid milk and other dairy products to the Kroger Company, and other parties, not involved here, in violation of section 2(a) of the Act, as amended. Kroger was charged with knowingly inducing or receiving prices for fluid milk under its own and other private label brands, cottage cheese and other dairy products in its transactions with Beatrice which were discriminatory under section 2(f) of the Act.

It was over two years later that the Hearing Examiner dismissed the complaint because (1) the prosecution under section 2(a) against Beatrice failed since the discrimination charged did not have the effect condemned by section 2(a); (2) the charge against Kroger under section 2(f) must be dismissed because of the failure of the Beatrice prosecution under section 2(a); and (3) as further grounds, that Beatrice had established a good faith meeting of competition defense under section 2(b) and, as to Kroger, that there was no evidence that Kroger knew or had reason to believe that the prices Beatrice offered were not in fact cost justified or were not offered in good faith to meet an equally low price of a competitor.

On appeal to the Commission the dismissal of the complaint by the Hearing Examiner was set aside as to Kroger

and a cease and desist order was entered against it based upon a violation of section 2(f); Chairman Dixon with Commissioners Jones and MacIntyre made up the majority, and Commissioners Elman and Nicholson dissented. The charge against Beatrice was dismissed on its section 2(b) defense and no review was sought; the majority consisted of Commissioners Jones, Elman and Nicholson with Chairman Dixon and Commissioner MacIntyre dissenting. It is significant to note that none of the dissenters took issue with the Commission's finding concerning the initial bid that the Broughton dairy made to Kroger which led to the resulting discriminatory pricing by Beatrice.

2. The background of the parties.

In 1963 Kroger operated a chain of over 1400 retail grocery stores located in some 19 states and which sold a variety of products. Its national volume of sales ran over $2 billion a year, including its milk and other dairy products. Kroger's competition in its Charleston Division included national chains such as A & P as well as regional chains and independent supermarkets.

Beatrice is the third largest dairy company in the United States, with $569 million annual sales in 1963. In 1962 Beatrice was one of several dairies serving the various areas within Kroger's Charleston Division. Prior to 1962, all dairy products in this area were vendor branded, and the supermarkets generally carried two or more brands in their dairy cases. Most customers generally received the "full service" method of milk distribution, requiring the routeman to deliver and also stock the dairy case. Prices were generally based on wholesale list prices with discounts to large purchasers. This price structure began to erode

in 1962 when larger buyers, led by Kroger, began to demand and get formula prices based on the fluctuating cost of raw milk, and then by private branding of dairy products.

3. The circumstances surrounding the bidding.

In the fall of 1961, Kroger decided to explore private label sales in the hope that its own label might permit it to compete more profitably and effectively. Mr. Francis Casserly, manager of Kroger's Columbus Division, which was then operating a private label milk program, was designated to negotiate with dairies in the Charleston area. Casserly invited several companies, including Valley Bell, Broughton, Borden and Fairmont, to submit bids for bottling Kroger label milk for the Charleston Division.

The first bid received was from Broughton on January 6, 1962. It was in the form of tabulations covering each Kroger store location, showing the existing retail price, the prevailing wholesale price in the market, and a percentage figure for Kroger's gross profit. The Hearing Examiner found that Broughton offered discounts approximating 20 per cent from its list prices. The Commission found that the average discount amounted to "a little less than 11 per cent." It is uncontested that prices in the bid averaged a discount of 10.9 per cent. (Appendix 646.)

In January, 1962, Beatrice officials, who had heard rumors that Kroger was seeking private label milk, contacted Casserly and arranged a meeting on January 12. At that meeting the volume of business and area to be served were discussed. The Beatrice representatives were asked if they had an offer to make, and they said they were thinking in terms of a 15 per cent discount. Casserly replied,

"Well, forget it, I have already got one at 20" off the "existing list price." (Appendix 197) It stands undenied in the record that a 20 per cent discount was unheard of in the market area at that time. On January 25th Beatrice quoted 21 cents a pound on cottage cheese and Casserly "just told us right quick we weren't in the ballpark." (Appendix 234)

By letter of January 18, 1962, Casserly had informed the dairy companies that the bidding would be for a sales volume of dairy products in excess of $2 million annually. He indicated that Kroger was interested in some form of reduced service which would cut distribution costs, and requested bid prices based upon the cost of milk rather than discounts from the prevailing price structure.

Beatrice presented its first proposal to Kroger at a meeting with Casserly on February 9, 1962. The proposal included a price of 71 cents for a gallon of homogenized milk, arrived at by applying a discount of 16 to 18 percent for volume to the average price of 85 cents. Casserly told Beatrice representatives that they "might as well go back home" if that was all that they had to offer. (Appendix 207)

Casserly had not received any quotations lower than the Beatrice 71 cents per gallon bid at this time. The gallon jug was "the big item. That was the thing that really controlled this whole situation" (Appendix 206) and as the Hearing Examiner indicated, "the award of the contract might hinge on the gallon-jug price—since the 'gallon-jug was the big volume item.'" (Appendix ID-126) The first Broughton proposal contained prices per gallon ranging from slightly over 73 cents to more than 81 cents per gallon. Beatrice Division manager Stollings testified that Casserly nonetheless "told us of the 20 percent Broughton

price and he said, you don't have to be a very good mathematician to take an 85-cent average jug price and 20 per cent will show you that 71 cents is high." (Appendix 237) The discussion was promptly terminated. The Commission found that Casserly's rejection was not based on "any true appraisal" of the earlier Broughton offer, but that he simply thought he could get a better price. (Appendix O-25)

Other companies submitted bids. Broughton submitted a second proposal in February for $.7224 for a gallon of milk, and in March proposed prices ranging from $.6586 to $.6879. Fairmont's first proposal quoted prices ranging from $.6585 to $.8168, and later in February quoted prices ranging from $.6526 to $.7255. Borden submitted an offer, which varied according to the service and type of delivery.

On March 14, Beatrice representatives again met with Casserly and "quoted a 66 cents price." As Stollings reported it: "We talked about some of the other pricing. That is on a gallon jug . . . We talked about one or two other prices . . . We sat down across . . . the desk from Mr. Casserly and talked about a method of tying this price. That 66 cent price—I first talked about a 68 which was a 20 per cent discount, the Broughton discount from the 85 cent jug. At the time we were talking about this . . . Casserly said that he had received a bid from Fairmont that was better than this, and also mentioned that prices were 'collapsing' in the Charleston market (Appendix 239) . . . we worked out—me on one side and Mr. Casserly on the other—the mechanics—he did the mechanics. He had a calculator over there . . . and between the two of us we worked out a formula." (Appendix 240) Stollings further testified that he talked with Casserly about the 66 cent price, and Casserly replied that "now you are getting—you are in a

position of being competitive with some of the other people." (Appendix 239)

Beatrice's representatives made it clear that the 66 cent price would have to be approved by the Chicago office. In early April Stollings reviewed the proposal with Beatrice's house counsel and an accounting specialist. On April 9, 1962, Stollings met with Casserly and delivered a revision of the Beatrice proposal which had been approved by the home office. Prices were based on 66 cents per gallon of milk, and 17.5 cents per pound of cottage cheese. Kroger accepted the proposal and the companies began to operate under it in June, 1962.

4. The Section 2(f) violation.

Kroger claims that it cannot be found in violation of the discrimination clause of section 2(f) because Beatrice was absolved from its violation of the anti-discrimination provision of section 2(a) on its defense under section 2(b). It relies on a sentence in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953), "that a buyer is not liable under Sec. 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification *or not known by him not to be within one of those defenses*" at 74, Emphasis being added. But this was just another way of saying, as the Court did earlier in the opinion, that section 2(f) was "roughly the counterpart, as to buyers, of sections of the Act dealing with discriminations by sellers." At p. 63. That is to say, a buyer may not be prosecuted for inducing discriminatory prices which it knows a seller may offer with impunity under section 2(b). As the Court itself put it:

"the discriminatory price that buyers are forbidden by Sec. 2(f) to induce . . . cannot be read as declaring out of bounds price differentials within one or more of the 'defenses' available to sellers, such as that the price differentials reflect cost differences, fluctuating market conditions, or bona fide attempts to meet competition, as those defenses are set out in the provisos of Secs. 2(a) and 2(b)." At 70-71.

At first blush it might appear that Kroger's claim might have some merit, i.e. that a defense absolving its seller under section 2(b) operated *ipso facto* for its own acquittal. However, even granting the validity of such a deduction it would not be available here. *American Canteen* only holds that buyers may avail themselves of discriminatory prices that a seller may lawfully grant or those that are "not known by him [the buyer] not to be within one of these defenses." Id. The Commission found that Beatrice made a bona fide attempt to meet the Broughton bid which it was told by Kroger was the lower one. In so doing Beatrice was in good faith acting within a defense offered by section 2(b). On the other hand, Kroger knew that the Broughton bid was not lower and that the one of Beatrice was, therefore, not in fact responsive to an actual lower bid. In such a factual situation the seller's successful defense under § 2(b) cannot exculpate the buyer since Kroger knew that the prices offered by Beatrice and received by Kroger were not in fact within the defense of section 2(b). To hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices. See *Kintner, A Robinson-Patman Primer* 261. 315-331. In order for the buyer to be sheltered through the exoneration of the seller under section 2(b) the prices induced

must come within the defenses of that section not only from the seller's point of view but also from that of the buyer. To hold otherwise would violate the purposes of the Act and frustrate the intent of the Congress.

The findings of the Commission with regard to the misrepresentation of the Broughton bid are fully supported by substantial evidence throughout the record. Casserly himself testified that the bid was "an average of 20 per cent . . . a little above on some, a little below on others" (Appendix 299). Hutchinson, one of the Beatrice negotiators, testified that Casserly told him "I have already got one at 20" (Appendix 197). And Stollings (another Beatrice negotiator) testified that Casserly said that "he had 20 per cent off from Broughton on this business" (Appendix 230). The bid actually averaged 10.9 per cent discount off the wholesale list price. (Appendix 646). We find no denial of this fact in the appellant's briefs. It does contend that Commission counsel agreed before the Hearing Examiner that the bid was 20 percent. But Commission Counsel fully explained this. They admitted that in its original proposed findings to the Examiner it stated that the Broughton bid was 20 per cent off. But soon thereafter in its reply findings it told the Examiner that this was an error. It said that only four stores "were granted prices as low as .658, .66 and .68" (CX 103, B-C; G, Z 5) while all of the others ranged from 73.2 cents to 85.65 cents per gallon. (CX 103 B-Z-8). It further stated that cottage cheese—an important item—was "extremely high" in comparison to the final Beatrice proposal. At the time of the Broughton bid the one of Beatrice was 2 cents below Broughton on forty of the forty four stores and the four lower price stores were comparatively small outlets

of Kroger. Moreover, in its appeal brief to the Commission counsel discussed and denounced the bid under the heading: *"Kroger Misled the Dairies Concerning Receipt of a 20% Discount Offer"* (Appendix 560). And at argument before the Commission when Kroger pointed to the proposed finding to the Examiner as an admission that Broughton's bid was 20 percent off the Commission counsel again repudiated this claim and called the attention of the Commission to its prior rejection.

5. Other contentions.

We need not pause long with the remaining claims. The complaint clearly charges Kroger in the exact terms of the Act which, of course, is sufficient. Nor is there substance to the objection that the case was tried on a different theory before the Commission than that pursued before the Hearing Examiner. The release of Kroger by the Hearing Examiner on the theory that it was required because of the acquittal of Beatrice was, of course, attacked before the Commission and caused more attention to be focused on Casserly's testimony. But counsel for the Commission maintained to the Examiner that Casserly had misrepresented the Broughton bid. It necessarily had to give more emphasis to the Casserly testimony in its presentation to the Commission in order to meet the Hearing Examiner's order exculpating Kroger. Indeed, Kroger's strategy before the Hearing Examiner emphasized that its responsibility could not be judged by the acts of Beatrice. Kroger's own counsel repeatedly objected before the Hearing Examiner to the relevance of certain evidence as to Kroger but not to Beatrice on the ground that "independent acts of Party A had nothing to do with the responsibility of

Party B." That is exactly the theory on which the Commission acted in finding Kroger responsible.

Moreover, we find no support for the charge that the Commission holding places the buyer at his peril whenever he engages in price bargaining. The use by the Commission of the "hard bargaining" language as well as the failure of Kroger "to convey any correct information about the price levels being quoted by others is but a warning, not a command. The controlling point here is not the "hard bargaining" nor the "price levels" but the misrepresentation of the Broughton bid.

Finally, Kroger argues that the Commission failed to meet the burden of proving that Kroger knew or should have known that Beatrice's prices were not cost justified and there was no substantial evidence that the differentials on Kroger's private label product injured competition. We find that there is substantial evidence supporting each of the Commission's findings, including these.

As to cost justification, the showing of Beatrice was found by both the Hearing Examiner and the Commission to be entirely inadequate. We agree with this finding. In addition, Kroger was specifically warned by two dairy suppliers of Robinson-Patman Act problems that might result from the lower prices it sought. Still its expert in the purchasing and selling of dairy products, Mr. Casserly, pursued his course. He was a man of extremely wide experience in every line of the dairy industry, including the production, processing and retailing of such products. He knew trade discounts, market conditions and cost accounting. Indeed, Casserly himself built up the cost formula which resulted in discriminations aggregating 39 per cent in some markets and as high as 41 per cent on cottage cheese. In these lights

—coupled with the other circumstances surrounding the transaction—it is beyond question that Kroger knew—or should have known—that Beatrice's prices were not cost justified.

Likewise the differentials that Kroger received impaired competition. We start with the proposition that evidence of discrimination in only one area is sufficient to meet the requirements of the Act. *Foremost Dairies, Inc.* v. *Federal Trade Commission,* 348 F. 2d 674, 681 (5 C.A. 1965), certiorari denied, 382 U.S. 959. Moreover, "a substantial price advantage can afford a favored buyer a material capital advantage . . . which will give him a substantial advantage over his competition." Therefore, as the Fifth Circuit said in *Foremost,* supra: "It is unnecessary that there be evidence that the favored customer actually undersold his rivals." At 680. See also *National Dairy Products Corp.* v. *Federal Trade Commission,* 395 F. 2d 517, 522 (7 C.A. 1968), certiorari denied 393 U.S. 977.

In this case Kroger contends that its purchase of vendor labeled milk from Beatrice should be aggregated with its purchases of private label milk. *Federal Trade Commission* v. *Borden Co.,* 383 U.S. 637 (1966). We think that the Commission correctly rejected the application of this principle since Beatrice labeled milk was only sold in 11 of the 44 stores in the relevant areas (CX 37, 64 F-H, 65 A-H; Appendix 296-297, 319, 519-527, 631-645). Moreover, the large Charleston and Logan areas received no Beatrice labeled products and the all-important gallon jug was not available under the Beatrice label in any Kroger store. Furthermore, *Borden* recognizes the competitive advantage which results when disadvantaged competitors are denied a label which the favored buyer receives. Kroger reaped

this very advantage. It received Kroger labeled milk at cheaper prices than it received Beatrice labeled milk and consequently placed its label in a competitively superior position. It did not reduce the retail price of its private label milk and, thereby, pass on lower prices to the consumer, but reaped higher profits for itself. The result was that it sold enormous quantities of milk at higher profits, as is clearly shown by its own chart in Addendum I to its brief filed in this court.

However, the point that the Commission should have treated the private labeled product and the nationally branded one as "goods of like grade and quality," *Borden, supra,* need not be labored. Beyond any question in the three market areas where both labels were sold the discrimination ran from 9.7 to 30.8 per cent and averaged 16 per cent (CX 390).

The Commission properly inferred that there was a reasonable probability of substantial injury to competition since the discriminations were as high as 41 per cent (in cottage cheese); averaged in one market more than 28 per cent, for other markets 17 per cent, and in Charleston, the most important area, more than 12 per cent. See chart, page 34, Commission's brief. The discrimination here is among the highest in a litigated case under the Clayton Act.[4] The record shows that in the retail food business

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[4] Examples of discounts in secondary-line injury cases may be found in *United States* v. *Borden Co.*, 370 U.S. 460, 463-464 (11%); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 41 (5% to 10%); *National Dairy Products Corp.* v. *Federal Trade Commission*, 395 F.2d 517, 521 (7th Cir. 1968), *cert. denied*, 393 U.S. 977 (12%); *Foremost Dairies, Inc.* v. *Federal Trade Commission*, 348 F. 2d 674, 675 (5th Cir. 1965), cert. denied, 382 U.S. 959 (5%); *Dean Milk Co.* v. *Federal Trade Commission*, 395 F. 2d 696, 708 (2% to 10%); and *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351, 364 (9th Cir. 1966), rev'd on other grounds, 390 U.S. 341, 358 (33%).

"competition is keen and profit margins are low" *Foremost Dairies, Inc., supra,* at 681; *National Dairy Products Corp., supra,* at 522; *Federal Trade Commission* v. *Fred Meyer, Inc., supra,* at 367. In addition it is uncontested that dairy products are often used as "leaders" to attract customers. It follows that the injury found to be present involving a secondary-line here permits wide inferences of adverse competitive effects based on the existence of substantial price differentials. *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 46-47 (1948); *American Motors Corporation* v. *F.T.C.,* 384 F. 2d 247, 250-251 (6 C.A. 1967) Cert. denied 390 U.S. 1012; *Foremost Dairies, Inc.* v. *F.T.C., supra,* at 679-680; *National Dairy Products, Inc.* v. *F.T.C., supra,* at 522, *United Biscuit Co.* v. *F.T.C.,* 350 F. 2d 615, 622 (7 C.A. 1965) cert. denied 383 U.S. 926. Indeed, in wholesale fluid milk sales discounts from 5 per cent to 12 per cent have been held to have the required competitive effect on the secondary-line level, *Foremost Dairies, Inc.* v. *F.T.C., supra,* at 679; *Dean Milk Co.* v. *F.T.C.,* 395 F. 2d 696, 708-709 (7 C.A. 1968); *National Dairy Products Corp.* v. *F.T.C., supra,* at 522.

We follow the teaching of *Automatic Canteen, supra,* where the court emphasized:

> "[T]he buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices. Enforcement of the provisions of Sec. 2(f) against such a buyer should not be difficult." At 79.

The order of the Federal Trade Commission is affirmed and enforced.

APPENDIX B

Order

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 20,233

THE KROGER COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Before:

CLARK, *Associate Justice,*
McCREE and MILLER, *Circuit Judges.*

On Petition for Review of an order of the Federal Trade Commission,

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the order of the Federal Trade Commission be and it is hereby affirmed and enforced.

It is further ordered that Respondent recover from Petitioner the costs on appeal, as itemized below.

Entered by order of the Court.

CARL W. REUSS
Clerk

Order of the Court of Appeals

A TRUE COPY

Attest:

CARL W. REUSS, *Clerk*

By HELEN TOOHEY
Deputy Clerk

(Seal Omitted)

FILED
FEB 25 1971
CARL W. REUSS, *Clerk*

APPENDIX C

Statutes Involved

The Clayton Act, as amended by the Robinson-Patman Act

Subsections 2(a), 2(b) and 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, provide (15 U.S.C., subsections 13(a), (b) and (f)):

Subsection 2(a)

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds neces-

sary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

Subsection 2(b)

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to

meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Subsection 2(f)

"It shall be unlawful for any person engaged in commerce, in the course of such commerce knowingly to induce or receive a discrimination in price which is prohibited by this section."

The Administrative Procedure Act

In pertinent part, the Administrative Procedure Act provides (5 U.S.C. (Supp. V), §§ 554(a), (b)(2)(3)):

"(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.

* * *

"(b) Persons entitled to notice of an agency hearing shall be timely informed of—

* * *

"(2) the legal authority and jurisdiction under which the hearing is to be held; and

"(3) the matters of fact and law asserted."

APPENDIX D

Regulations Involved

Rules of Practice for Adjudicative Proceedings, Federal Trade Commission

The Federal Trade Commission's Rules of Practice for Adjudicative Proceedings provide, in pertinent part (Rule 341(d), 16 C.F.R. § 341(d); Rule 341(a), 16 C.F.R. § 354 (a)):

Rule 3.41(d)

"*Adverse Witnesses.*—An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling or evasive, may be interrogated by leading questions and may also be contradicted and impeached by the party calling him."[1]

Rule 3.54(a)

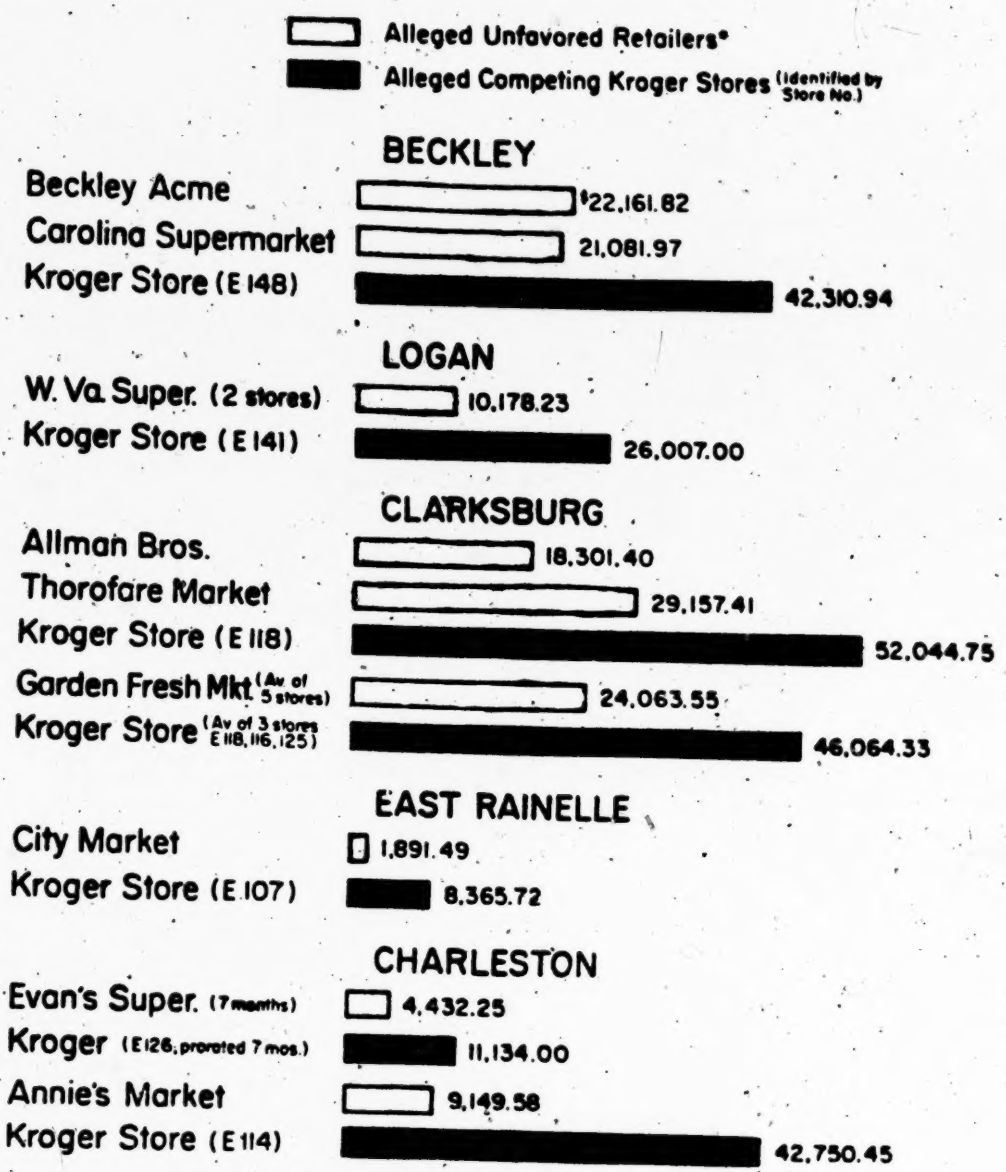
"Upon appeal from or review of an initial decision, the Commission . . . will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision."

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[1] Rule 3.16(e) of the Rules in effect when the Commission hearing was held. 16 C.F.R. (1960 Ed.) § 3.16(e).

ADDENDUM I

COMPARATIVE PURCHASE VOLUMES FROM BEATRICE MILK AND COTTAGE CHEESE - JUNE 1962 - MAY 1963



Sources:

UNFAVORED RETAILERS: Complaint Counsel's Appeal Brief, Appendix VI: 2d Data Column.
COMPETING KROGER STORES: RDX 109B (Volumes); CX 308 and 88 (Competitive Relationship).

*I.e., every other retailer for whom Complaint Counsel Specified Purchase Volumes from Beatrice in their Appeal Brief (Appendix VI).

Average Price Discrimination and Resulting Injury to Kroger's Competitors In the Purchase of Milk and Cottage Cheese During Stipulated Time (June 1962-October 1963) In the Relevant Markets

Market Area	Competitors of Kroger	Prices Actually Paid Beatrice for Total Purchases of Milk and Cottage Cheese	Prices if Kroger had made Identical Purchases	Difference in Prices Showing Injury in Dollars	Injury in Percent
Beckley	Beckley Acme	$39,403.05	$ 32,502.58	$ 6,900.47	17.51%
	Carolina Super Market	38,014.49	31,524.34	6,489:15	17.07%
Charleston	Annie's Market	14,781.32	12,975.89	1,805.43	12.21%
	Evans Supermarket[37]	5,298.59	4,432.25	866.34	16.00%
Clarksburg	Thorofare Market	48,488.58	41,176.61	7,311.97	15.11%
	Allman Brothers	30,373.90	25,952.80	4,421.10	14.55%
	Garden Fresh Markets[38]	176,336.04	158,303.95	18,032.09	10.22%
Logan	W. Va. Supermarkets	18,277.10	15,627.59	2,649.51	14.5 %
Lewisburg	City Market East Rainelle	3,670.40	2,642.15	1,028.25	28.01%

[37] Figures for cottage cheese were not available and figures for milk was available only to December 1962, therefore, the data reflect only purchases of milk from June-December 1962 (A 621).

[38] Cottage cheese figures were not available and the month of October is not included (A 624).